Bhaskar a/l Nadarajan v Jabatan Pengangkutan Jalan Wilayah Persekutuan Kuala Lumpur & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-11ANCVC-66–05 OF 2018
DARRYL GOON JC
29 AUGUST 2018

Civil Procedure — Striking out — Writ and statement of claim — Appellant lost his lorry after negligent act by public officer — Tort action against government — Public officer responsible for alleged negligence not cited as party — Rules of Court 2012 O 18 r 19

Limitation — Public authorities — Tort — Appellant lost his lorry after negligent act by public officer — Action against government beyond 36 months after alleged negligence — Whether action time-barred — Public Authorities Protection Act 1948 s 2(a)

Tort — Negligence — Vicarious liability — Appellant lost his lorry after negligent act by public officer — Tort action against government — Whether government could be sued — Whether public officers must be named — Government Proceedings Act 1956 ss 5 & 6

This was an appeal against the decision of the learned magistrate in allowing the respondents' application to strike out the appellant's action under O 18 r 19 of the Rules of Court 2012 ('the ROC'). The appellant claimed that he was the registered owner of a lorry and sometime in June 2012, an individual by the name of Ariffin approached him for a copy of his identity card for the purposes of getting a permit to use the appellant's lorry. The appellant obliged. A month thereafter, someone by the name of Kogelavanan informed the appellant that the registration of his lorry had been transferred to a third party. It was also alleged that Kogelavanan admitted that he had transferred the registration of the appellant's lorry without the appellant's knowledge. The appellant alleged that Kogelavanan had committed a fraud and or deceived the appellant and this was due to the first respondent's failure to properly examine the documents that were used to effect the transfer of registration of his lorry. The respondents were of the view that the claim was time barred by reason of the provisions under s 2(a) of the Public Authority Protection Act 1948 ('the PAPA'). The respondents also maintained that the first respondent was not a legal entity that may be sued and, in addition, the appellant had breached ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA') because no public officer

A alleged to be the primary tortfeasor was cited as a party. The respondents therefore applied to have the writ and statement of claim struck out pursuant to O 18 r 19(1)(a), (1)(b) or (1)(d) of the ROC. The learned magistrate allowed the respondents' application and hence this appeal.

B **Held**, dismissing the appeal with costs of RM3,000 to the respondent subject to payment of 4% allocator:

(1) The concept of 'continuance of injury or damage' did not pertain to the injury or damage that was caused, but pertained to the continuance of the C act that caused the injury or damage. Thus, the 36 month limitation period in s 2(a) was to be reckoned from the cessation of the act or omission which caused the injury or damage or, to put it in another way, the act or omission upon which the cause of action was founded (see para 9).

D (2) The alleged negligent act (or omission), would had had to occur before the appellant could had suffered any damage ie the loss of his lorry. The alleged negligence could not, therefore, be a continuing wrong although the damage caused ie the loss of the appellant's lorry, remained. As such, the respondent's action herein was commenced beyond the time limited E under s 2(a) of the PAPA and, was plainly unsustainable (see para 10).

(3) No individual was cited as a party who was alleged to be a public officer and the primary tortfeasor in respect of the alleged negligence. By reason of ss 5 and 6 of the GPA, the alleged public officer who was said to be the F primary tortfeasor must be cited as a party. For the government to be vicariously liable, there must be a primary tortfeasor and that primary tortfeasor must be a public officer under the GPA (see para 11).

[Bahasa Malaysia summary

G Ini adalah rayuan terhadap keputusan majistret yang bijaksana dalam membenarkan permohonan responden untuk membatalkan tindakan perayu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('Kaedah'). Perayu mendakwa bahawa beliau adalah pemilik berdaftar sebuah lori dan pada Jun 2012, seorang individu dengan nama Ariffin menghampirinya untuk H mendapatkan salinan kad pengenalannya untuk tujuan mendapatkan permit untuk menggunakan lori perayu. Perayu menurut. Sebulan selepas itu, seseorang dengan nama Kogelavanan memberitahu perayu bahawa pendaftaran lorinya telah dipindahkan ke pihak ketiga. Ia juga dikatakan bahawa Kogelavanan mengakui bahawa dia telah memindahkan pendaftaran I lori perayu tanpa pengetahuan perayu. Perayu mendakwa bahawa Kogelavanan telah melakukan fraud dan menipu perayu dan ini disebabkan kegagalan responden pertama untuk mengkaji dokumen yang digunakan untuk memindahkan pendaftaran lorinya. Responden-responden berpendapat bahawa tuntutan tersebut telah dihalang masa disebabkan oleh peruntukan di

bawah s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'). Responden-responden juga berpendapat bahawa responden pertama bukanlah entiti undang-undang yang boleh didakwa dan, selain itu, perayu telah melanggar ss 5 dan 6 Akta Prosiding Kerajaan 1956 ('APK') kerana tiada pegawai awam yang dikatakan sebagai pelaku tort utama telah dinamakan sebagai pihak. Oleh itu, responden-responden memohon untuk membuat writ dan penyataan tuntutan dibatalkan menurut A 18 k 19(1)(a), (1)(b) atau (1)(d) Kaedah. Majistret yang bijaksana membenarkan permohonan responden-responden dan oleh itu rayuan ini.

Diputuskan, menolak rayuan dengan kos RM3,000 kepada responden tertakluk kepada pembayaran 4% alokatur:

(1) Konsep 'kecederaan atau kerosakan berlanjutan' tidak berkaitan dengan kecederaan atau kerosakan yang disebabkan, tetapi berkaitan dengan tindakan yang menyebabkan kecederaan atau kerosakan. Oleh itu, tempoh had 36 bulan dalam s 2(a) dikira dari pemberhentian perbuatan atau peninggalan yang menyebabkan kecederaan atau kerosakan atau, untuk meletakkannya dengan cara lain, tindakan atau peninggalan apabila kausa tindakan telah diketahui (lihat perenggan 9).

(2) Dakwaan tindakan kecuaian (atau peninggalan), mestilah berlaku sebelum perayu mengalami apa-apa kerosakan iaitu kehilangan lorinya. Kecuaian yang dikatakan tidak boleh, oleh itu, menjadi kesalahan berlanjutan meskipun kerosakan yang disebabkan iaitu kehilangan lori perayu, adalah kekal. Oleh itu, tindakan responden-responden telah bermula melebihi had masa di bawah s 2(a) APPBA dan, dengan jelas tidak dapat dikekalkan (lihat perenggan 10).

(3) Tiada individu yang disebut sebagai pihak yang didakwa sebagai pegawai awam dan pelaku tort utama berkenaan dengan kecuaian yang dikatakan. Oleh sebab ss 5 dan 6 APK, pegawai awam yang dikatakan sebagai pelaku tort utama mesti disebut sebagai pihak. Bagi pihak kerajaan untuk menjadi wakil yang bertanggungjawab, perlu ada pelaku tort utama dan pelaku tort utama mestilah pegawai awam di bawah APK (lihat perenggan 11).]

Notes

For cases on tort, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2680–2681.
For cases on vicarious liability, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2217–2224.
For cases on writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9563–9581.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Ceratrade (M) Sdn Bhd v Jabatan Pengangkutan Jalan Malaysia & Anor [2012] MLJU 311, HC (refd)
Kavitha a/p Krishnan & Anor v Kerajaan Malaysia [2014] 10 MLJ 586; [2013] 3 CLJ 1155, HC (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Ronald Beadle v Hamzah HM Saman & Ors [2007] 2 MLJ 201; [2007] 1 CLJ 421, FC (refd)

Legislation referred to

Government Proceedings Act 1956 ss 5, 6
Public Authority Protection Act 1948 s 2(a)
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(d)
Rules of the High Court 1980 O 18 r 19

K Revathi (Revathi & Partners) for the appellant.
Ahmad Faiz Razali (Federal Counsel, Attorney General's Chambers) for the respondents.

Darryl Goon JC:

[1] This is an appeal against the decision of the learned magistrate handed down on the 14 of May 2018 in allowing the respondents' application to strike out the appellant's action under O 18 r 19 of the Rules of Court 2012.

BACKGROUND AND MATERIAL FACTS

[2] The appellant, who was the plaintiff in the action, claimed that he is the registered owner of a lorry with the registration No BHF 7133. The appellant then claimed that sometime in June 2012, an individual by the name of Ariffin approached him for a copy of his identity card for the purposes of getting a permit to use the appellant's lorry. The appellant obliged. A month thereafter, the appellant met someone by the name of Kogelavanan who informed the appellant that the registration of his lorry had been transferred to a third party. It was also alleged that the said Kogelavanan admitted that he had transferred the registration of the appellant's lorry without the appellant's knowledge. The appellant avered that the first respondent, the first defendant in the action, was the agency responsible for ascertaining and ensuring that the particulars and actions of the individual who effected the transfer of registration of the appellant's lorry, was valid and proper. The second respondent, the Government of Malaysia, was the second defendant in the action. The appellant alleges that Kogelavanan had committed a fraud and or deceived the

appellant and this was due to the first respondent's failure to properly examine the documents that were used to effect the transfer of registration of his lorry. These were all pleaded in the statement of claim.

[3] As for the particulars of negligence, the appellant alleged as follows in the statement of claim:

BUTIR-BUTIR KECUAIAN DEFENDAN PERTAMA

(a) Defendan Pertama gagal untuk memeriksa setiap dokumen yang dibawa oleh pihak ketiga untuk menukar hakmilik lori milik Plaintif;

(b) Defendan pertama gagal mengenalpasti samada individu yang telah hadir ke pejabat Defendan Pertama merupakan agen/individu yang sah yang telah diberi autoriti oleh Plaintif untuk menjalankan kerja-kerja memindahmilik hakmilik lori milik Plaintif tersebut;

(c) Defendan Pertama gagal mengesahkan samada individu yang memohon untuk membuat pertukaran hakmilik Lori tersebut mempunyai autoriti yang sah telah menandatangani dan/atau melaksanakan dokumen-dokumen memindahmilik hak milik lori milik Plaintif tersebut.

[4] As a consequence the appellant sought the following reliefs:

(a) Defendan Pertama menukar semula Hak milik Lori dengan No Pendaftaran: BHF 7133 kepada nama Plaintif dalam tempoh tujuh (7) hari dari tarikh penghakiman dikurniakan;

(b) Ganti Rugi Khas sebanyak RM60,000.00

(c) Ganti rugi am untuk ditaksirkan oleh Mahkamah yang Mulia ini;

(d) Faedah 5% setahun ke atas jumlah penghakiman dari tarikh pemfailan Writ sehingga penyelesaian sepenuhnya;

(e) Kos; dan

(f) Relif selanjutnya atau yang lain yang Mahkamah yang Mulia ini menganggap sesuai.

[5] The appellant's claim was denied by the respondents. The respondents were of the view that the claim was time barred by reason of the provisions under s 2(a) of the Public Authority Protection Act 1948 ('the PAPA'). This defence of limitation was specifically pleaded in the respondents' defence. The respondents also maintained that the first respondent was not a legal entity that may be sued and, in addition, the appellant had breached ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA') because no public officer alleged to be the primary tortfeasor was cited as a party.

[6] Having regard to the foregoing, the respondents applied to have the writ

and statement of claim struck out pursuant to O 18 r 19 (1)(a), (1)(b) or (1)(d) of the Rules of Court 2012 or, in the alternative, pursuant to the inherent jurisdiction of the court.

[7] After hearing the application, the learned magistrate allowed the respondents' application with costs to the respondents of RM1,000. The learned magistrate was of the view that the action brought by the appellant was out of time having regard to the provisions in s 2(a) of the PAPA. In addition, based on the authority of the Federal Court's decision in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, the learned magistrate held that the appellant had failed to cite as a party, any officer who was allegedly responsible for the breach of duty. The bases for the learned magistrate's decision are clearly articulated in her grounds of judgment of 11 July 2018, which is to be found in the supplementary record of appeal.

THE APPEAL

[8] The pleaded incident from which the appellant learnt of the alleged fraud occurred sometime in July 2012. This assertion is pleaded in the statement of claim. Therefore the alleged negligence on the part of the first respondent would have had to have occurred by July 2012. It was this negligence that, it is alleged, the transfer of the appellant's lorry was made possible. The writ in this action was issued out of the Magistrates Court in Wilayah Persekutuan on the 22 December 2017, more than five years after the alleged negligence would have occurred. In this regard, s 2(a) of the PAPA states as follows:

> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
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> > (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

It is therefore clear that the writ was issued beyond the time limited of 36 months under s 2(a) of the PAPA. Learned counsel for the appellant however, maintained that the claim in this action was in fact a case of 'a continuance of injury or damage' and therefore time, ie the 36 months prescribed, will only begin to run when the injury or damage ceases. This is so because, as learned counsel contended, the loss in respect of the ownership of the lorry in question and the loss of income that the appellant had derived from the lorry were still continuing.

[9] Learned federal counsel for the respondents countered the appellant's contention by citing the decision of the Court of Appeal in *Ronald Beadle v Hamzah HM Saman & Ors* [2007] 2 MLJ 201; [2007] 1 CLJ 421. In the judgment of the Court of Appeal, Richard Malanjum JCA (as the learned Chief Justice then was) explained in lucid terms what is meant by 'continuing injury or damage' in s 2(a) of the PAPA:

> [16] Thus, s 2(a) of the PAPA provides that any suit, action, prosecution or other proceeding commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority shall not lie or instituted unless:
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> (a) it is commenced within 36 months next after the act, neglect or default complained of; or
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> (b) in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof.
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> [17] Two sets of situations are therefore envisaged for the limitation periods stipulated therein to arise. The first set deals with where the act, neglect or default complained of' referred to is confined to a single act, neglect or default and does not involve an element of continuance thereof and that a single act per se would constitute a complete cause of action (see (Malaysia) in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871; [1991] 1 CLJ Rep 69 (SC)).
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> [18] The other set is where the limitation period begins to run when the injury or damage ceases (see: *Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri, High Court* [2003] 5 MLJ 294; [2003] 6 CLJ 144).
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> [19] this section was also succinctly explained by Wan Sulaiman J (as he then was) in the case of *Mak Koon Yong & Anor v Municipal Councillors, Malacca* [1967] 1 MLJ 256. After referring to the English Court of Appeal case of *Carey v Metropolitan Borough of Bermondsey* 20 TLR the learned judge said this at p 259:
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> > Court of Appeal held in respect of that section of the English Act which is in pari materia with our s 2(a) that 'the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage'. Time would therefore begin to run for the purposes of the Ordinance, from the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased.
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> [20] Indeed, in *Carey v Bermondsey Borough Council* [1906] 94 LT 216 the word 'continuance' found in s 1 of the Public Authorities Protection Act 1893 of the United Kingdom was construed to mean 'a continuing causing of action' or the continuance of the act which caused the damage (see also *Markey v Tolworth Joint Isolation Hospital District Board* [1900] QBD 454).

Therefore it is clear that the concept of 'continuance of injury or damage' does not pertain to the injury or damage that was caused, but pertains to the continuance of the act that caused the injury or damage. Thus, the 36 month limitation period in s 2(a) is to be reckoned from the cessation of the act or

omission which caused the injury or damage or, to put it in another way, the act or omission upon which the cause of action is founded. To my mind, a clear example would be that of a claim for trespass to land. So long as the trespasser remains on the land, there is a continuing trespass and, time, for the purposes of s 2(a) of the PAPA, will not begin to run until the trespasser ceases the act of trespassing.

[10] In this case, based on the allegations in the statement of claim, the pleaded cause of action was the tort of negligence. The alleged negligent act (or omission), would have had to occur before the appellant could have suffered any damage ie the loss of his lorry. The alleged negligence could not, therefore, be a continuing wrong although the damage caused ie the loss of the appellant's lorry, remains. As such, and having regard to the decision in *Ronald Beadle*, I am in agreement with the learned magistrate that the respondent's action herein was commenced beyond the time limited under s 2(a) of the PAPA and, is plainly unsustainable.

[11] In addition, no individual was cited as a party who was alleged to be a public officer and the primary tortfeasor in respect of the alleged negligence. In *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors*, Nik Hashim FCJ, delivering the judgment of the Federal Court, held as follows:

> [16] Thus, I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman*. Contrary to the finding of the Court of Appeal, *Haji Abdul Rahman* was correctly decided and should be upheld. Therefore, *on the proper construction of ss 5 and 6 of Act 359 (the GPA), in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established*. It is only upon a successful claim against the officer personally can a claim be laid against the government. (Emphasis added.)

Therefore it is quite clearly the law that by reason of ss 5 and 6 of the GPA, the alleged public officer who is said to be the primary tortfeasor must be cited as a party (see also *Kavitha a/p Krishnan & Anor v Kerajaan Malaysia* [2014] 10 MLJ 586; [2013] 3 CLJ 1155). The rationale for this procedural requirement is quite obvious. For the government to be vicariously liable, there must be a primary tortfeasor and that primary tortfeasor must be a public officer under the GPA. Of course, for actual liability to attach to the government, negligence on the part of the public officer must be proven.

[12] Quite apart from the requirements of ss 5 and 6 of the GPA, the learned federal counsel also contended that the first respondent, as described, is not a legal person or entity that may be sued. It is merely a department; in this case, a department in Wilayah Persekutuan, Kuala Lumpur. Learned counsel for the

appellant maintains, however, that the question whether the first respondent is a legal person or entity that may be sued is a matter to be decided at trial. This was the view of the court in *Ceratrade (M) Sdn Bhd v Jabatan Pengangkutan Jalan Malaysia & Anor* [2012] MLJU 311 where Hue Siew Kheng J held, in respect of an application under O 18 r 19 of the Rules of the High Court 1980 that, 'I am of the opinion that the issue whether the first defendant is a legal entity which can sue or be sued is very much a live issue that should be resolved by the trial court.' However, the first respondent cited in this case was not merely the 'Jabatan Pengangkutan Jalan Malaysia' (as was the case in *Ceratrade*) but the 'Jabatan Pengangkutan Jalan, Wilayah Persekutuan Kuala Lumpur', the latter being only a branch or part of the former in Wilayah Persekutuan Kuala Lumpur, even if the former is itself a legal entity that may be sued.

[13] Having regard to the foregoing, and in regard to the application under O 18 r 19 of the Rules of Court 2012, it is plain and obvious that the appellant's action herein is unsustainable (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). I am therefore in agreement with the decision of the learned magistrate and the appellant's appeal herein is dismissed with costs. After hearing submissions from learned counsel for the parties, costs of RM3,000 is awarded to the respondent subject to payment of 4% allocatur.

Appeal dismissed with costs of RM3,000 subject to payment of 4% allocatur.

Reported by Ahmad Ismail Illman Mohd Razali